SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NUMBER 939

JOHN OWEN TYLER,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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JOHN OWEN TYLER,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

John Owen Tyler petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the case of John Owen Tyler versus The United States of America on the 10th day of July, 1968.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is appended hereto and is officially reported in 397 F.2d 565.

JURISDICTION

The judgment of the United States Court of Appeals was entered on July 10, 1968. A rehearing in said case was denied by that Court on December 17, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) authorizing the grant of a writ of certiorari to a United States Court of Appeals upon the petition of any party to any criminal case after rendition of judgment.

QUESTION PRESENTED FOR REVIEW

The question presented for review is whether a defendant, convicted in a federal court for willful failure to file excise tax returns and pay excise taxes under the Federal Wagering Tax Act prior to the holding of the Supreme Court in *Marchetti v. United States,* 390 U.S. 39 (1968) and *Grosso v. United States,* 390 U.S. 62, 71 (1968), but subsequent to its holding in *United States v. Kahriger,* 345 U.S. 22 (1953) and *Lewis v. United States,* 348 U.S. 419 (1955), has waived his Fifth Amendment privilege against self-incrimination by filing tax returns and paying excise taxes for other months than those for which he is prosecuted.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment of the Constitution of the United States provides in part:

> "No person * * * * * shall be compelled in any criminal case to be a witness against himself."

Title 26 U.S.C.A., Section 4401 provides:

§ 4401. Imposition of tax

(a) Wagers.—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) Amount of wager.—In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons liable for tax.—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4413 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him. Aug. 16, 1954, c. 736, 68A Stat. 525; Sept. 2, 1958, Pub.L. 85-859. Title I, §151 (a), 72 Stat. 1304.

Title 26 U.S.C.A., Section 7203 provides:

§ 7203. Willful failure to file return, supply information, or pay tax

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 851.

STATEMENT OF CASE

Petitioner, John Owen Tyler, was indicted in the United States District Court for the Northern District of Georgia on a 25 count indictment. 22 of the counts charged petitioner with Attempting to Evade and Defeat the Payment of Excise Taxes relating to the Wagering Tax Act, each count alleging specifically charged monthly periods. Counts 5, 7 and 8 charged petitioner with willfully failing to file Excise Tax Returns and willfully failing to pay excise taxes due under the Wagering Tax Act, again alleging specifically charged monthly periods. Each of the 25 counts related to different periods of time from the others.

Petitioner was convicted of the three misdemeanor charges of willfully failing to pay excise taxes and a mis-

trial was declared by the Court as to the 22 remaining felony counts because of a failure of the jury to agree.

The United States Court of Appeals for the Fifth Circuit affirmed the conviction on July 10, 1968, after having heard argument of counsel thereon during April, 1967, and no mention or suggestion was made in the opinion as to the effect of *Marchetti v. United States,* 390 U.S. 39 or *Grosso v. United States,* 390 U.S. 62, in holding the Wagering Tax Act constitutionally unenforceable, on January 29, 1968.

A petition for rehearing was filed by the petitioner, setting forth the *Grosso* and *Marchetti* rulings, and the Court of Appeals denied the petition on December 17, 1968, in a Per Curiam decision holding that: "The record here affirmatively establishes waiver by this defendant within the meaning of *Grosso,* supra." (Appendix B.)

BASIS OF FEDERAL JURISDICTION

The indictment having been returned in the district court for violation of the Federal Wagering Tax Act, the federal court had jurisdiction of the proceedings in the court of first instance.

SUMMARY OF REASONS FOR ALLOWANCE OF WRIT

1. The decision of the United States Court of Appeals for the Fifth Circuit in this case is contrary to the holding by this Court in *Grosso* and *Marchetti* in that the decision is contrary to the following holding in *Grosso v. United States:*

> "Petitioner has not, however, asserted a claim of

privilege either as to the counts which charged willful failure to pay the occupational tax, or as to the allegation that he conspired to evade payment of the occupational tax. Given the decisions of this Court in *Kahriger* and *Lewis,* supra, which were on the books at the time of petitioner's trial, and left untouched by *Albertson v. SACB,* supra, we are unable to view his failure to present this issue as an effective waiver of the constitutional privilege."

2. The decision of the Court of Appeals overlooks the fact that each of the 25 counts alleged in the indictment charges a separate and distinct offense, covering a different period of time, and that a compliance with the provisions of the Wagering Tax Act in any given month will not effect a waiver as to those months during which non-compliance has taken place, any more than the fact of registering and paying the occupational tax will be a waiver of the right to assert the self-incrimination privilege as to the excise tax requirements.

ARGUMENT IN SUPPORT OF REASONS RELIED ON FOR ALLOWANCE OF WRIT

During the periods from 1960 through 1964, at which times petitioner filed excise tax returns under the Wagering Tax Act, the rulings of this Court in *United States v. Kahriger,* 345 U.S. 22 and *Lewis v. United States,* 348 U.S. 419 were in full force and effect. Consequently, compliance by petitioner with the incriminatory registrational provisions of the Wagering Tax Act or filing of the excise tax returns for other unrelated period could never have been deemed *voluntary,* since they were performed by him under commandment of the statute and the previous rulings by this Court. Nor did petitioner, by his compliance in paying the excise taxes

for those months in which he made a return effect a waiver as held by the Court of Appeals any more than *Grosso* did when he failed to assert his constitutional claim on those counts charging him with failing to pay the occupational tax. *Grosso* did not raise the self-incrimination privilege either in the District Court, the Court of Appeals or the Supreme Court.

The Fifth Circuit Court of Appeals has also overlooked the ruling by this Court in *Lee v. Kansas City, Missouri,* 88 S.Ct. 901, No. 383, October Term, 1967, decided March 4, 1968, wherein certiorari was granted by this Court in a memorandum decision following *Grosso* and *Marchetti,* remanding the case to the state court for further proceedings. In *Lee* the petitioner had been tried in the state court on an ordinance prohibiting the possession of a gambling stamp pursuant to the provisions of the Wagering Tax Act, (414 S.W.2d, 251) and contended the ordinance to be unconstitutional. *Lee's* purchase of the gambling stamp was just as much a waiver of the right to later claim the self-incrimination clause of the Fifth Amendment as the petitioner's filing of the excise tax returns in this case.

In *Butler v. United States,* 361 F.2d 220, the Appellant had *pleaded guilty,* and the sentence of the court was affirmed. However, this Court, in its memorandum decision of March 4, 1968, (*DeCesare v. United States,* 88 S.Ct. 900,) vacated the judgment and remanded it to the Court of Appeals for further proceedings.

Both *Grosso* and *Marchetti,* and the other cases remanded by this Court on their principal, show just as much, if not more, questions of waiver than the case at bar. The United States Court of Appeals for the Fifth

Circuit erred in holding this petitioner to have waived his right to object to the conviction on grounds of self-incrimination.

APPENDIX

Appended hereto, as Appendix A, is a complete copy of the opinion of the Court of Appeals, and judgment and as Appendix B, is a complete copy of the opinion of the Court of Appeals on rehearing.

CONCLUSION

The affirmance of the United States Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

WESLEY R. ASINOF
Attorney for Petitioner
3424 First National Bank Bldg.
Atlanta, Georgia 30303

CERTIFICATE OF SERVICE

I, a member of the Bar of the Supreme Court of the United States do hereby certify that I have served counsel for respondent as follows: By mailing a copy of this petition this date to Owen A. Neff, Attorney, U. S. Department of Justice, Washington, D. C. by air mail postage prepaid and by mailing a copy this date to Charles Goodson, U. S. Attorney, Old Post Office Bldg., Atlanta, Georgia by first class postage prepaid.

This.....day of January 1969.

WESLEY R. ASINOF

APPENDIX "A"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 23784

JOHN OWEN TYLER,

Appellant,

VERSUS

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Georgia

(July 10, 1968)

Before COLEMAN and AINSWORTH, Circuit Judges, and CARSWELL, District Judge.

CARSWELL, District Judge: Appellant was convicted by a jury on 3 counts of a 25 count indictment for wilful failure to file excise tax returns and to pay excise taxes imposed upon gambling operations.

This appeal attacks the rulings of the trial court (1) in denying dismissal of the indictment; (2) in refusing a requested charge; (3) in allowing the jury to separate overnight during deliberations; (4) in accepting the jury's verdict on 3 counts of the indictment the following morning; and (5) in declaring a mistrial on the remaining counts.

We affirm on the first four issues presented, all of which have to do with Counts Five, Seven, and Eight upon which appellant was convicted. The record shows that the fifth point directed solely to other counts has not been presented to the district court for its necessary initial consideration. It is, moreover, immaterial to the judgment of conviction appealed from and here affirmed.

I. *Sufficiency of the Indictment*

The entire thrust of appellant's contention here is that the indictment, in its several counts, charges him with the acceptance of wagers but does not allege that acceptance was on his account or that such wagers were "placed with him." He urges that the acceptance of wagers does not attach liability for the payment of the excise tax and therefore no federal crime is charged and the indictment should have been dismissed.

We do not agree.

The most relevant portions of the excise tax statutes are:

(1) 26 U.S.C. 4401

"(a) Wagers.—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

* * *

"(c) Persons Liable for Tax.—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. . . ."

(2) 26 U.S.C. 4421

"For purposes of this chapter —

(1) Wager.—The term 'wager' means—

(A) Any wager with respect to a sports event or a contest placed with a person engaged in a business of accepting such wagers, . . ."

Also 26 CFR, Section 44.4401-2, provides, in part, as follows:

"Person liable for tax—(a) *In general.* (1) Every person engaged in the business of accepting wagers with respect to a sports event or a contest is liable for the tax on any such wager accepted by him. . . . To be liable for the tax, it is not necessary that the person engaged in the business of accepting wagers . . . physically receive the wager. . . . Any wager . . . received by an agent or employee on behalf of such person shall be considered to have been accepted by and placed with such person."

We can find no logic at all in appellant's contention that the specific words *placed with him* must be enunciated in an indictment to state a valid charge under Section 4401 (c), *supra,* where the words "engaged in the business of accepting wagers . . ." is specifically set forth.

In the context of this statute the words "accepting wagers" are synonymous with the phrase "wagers placed with him" and "on his account." This interpretation is reflected in a portion of 26 CFR 44.4401-2 which states: "Any wager . . . received by an agent or employee on behalf of such person shall be considered to have been

accepted by and placed with such person." (Emphasis added.) [1]

The legal efficacy of regulations such as this has been recognized by the Supreme Court. In *Maryland Casualty Co. v. United States,* 251 U.S. 342, 349 (1920):

> ". . . It is settled by many recent decisions of this court that a regulation by a department of government, addressed to and reasonably adapted to the enforcement of an act of Congress, the administration of which is confided to such department, has the force and effect of law if it be not in conflict with express statutory provision. *United States v. Grimaud,* 220 U.S. 506; *United States v. Birdsall,* 233 U.S. 223, 231; *United States v. Smull,* 236 U.S. 405, 409, 411; *United States v. Morehead,* 243 U.S. 607."

Moreover, this is consonant, with the legislative history of these excise tax statutes. In both the Senate and House Reports the following statement appears:

> "A person is considered to be in the business of accepting wagers if he is *engaged as a principal* who, in accepting wagers, does so on his own account. The principals in such transactions are commonly referred to as 'bookmakers' although it is not intended that any technical definition of 'bookmaker', such as the maintenance of a handbook or

---

[1] The authority to promulgate 26 CFR 44.4401-2 is contained in 26 U.S.C. 7805 (a) which states:

> "(a) Authorization. — Except where such authority is expressly given by this title to any person other than an officer or employee of the Treasury Department, the Secretary or his delegate shall prescribe all needful rules and regulations . . . as may be necessary by reason of any alteration of law in relation to internal revenue."

> other device for the recording of wagers, be required * * *. Persons who receive bets for principals are sometimes known as 'bookmakers' agents' or as 'runners.' " [Emphasis supplied.] H. R. Rep. No. 586, 82d Cong. 1st Sess. 56 (1951); Sen. Rep. No. 781, 82d Cong. 1st Sess. 114 (1951), U.S. Code Cong. and Adm. Service, 1951, pp. 1839, 2091."

We conclude that the district court properly denied the motion to dismiss the indictment and agree with its statement that:

> ". . . under the language and plain meaning of the applicable statutes and regulations, wagers are not considered as having been 'placed' with an individual until such time as they have been 'accepted' by him. The contractual nature of the wager requires an acceptance, and it is not until an acceptance has been manifested that a wager may be considered as having been 'placed'. Thus, the indictment charging that wagers were 'accepted' by the defendant sufficient[ly] states an offense under 26 U.S.C., §7201, and 26 U.S.C., §7203, regarding the liability of the defendant for taxes on wagers 'placed' with him. *Hagner v. United States,* 285 U.S. 427; *Spies v. United States,* 317 U.S. 492; *United States v. McCormick,* 67 F.2d 867, cert. den. 291 U.S. 662; *United States v. Pepe,* 198 F. Supp. 226; *United States v. Manos,* 340 F.2d 534."

II. *Requested Instruction*

The prosecution under Counts Five, Seven, and Eight was under 26 U.S.C. 7203 as noted before. The trial court refused appellant's requested instruction to the jury that another section of the gambling excise statute, i.e., 26 U.S.C. 7262, is a lesser included offense and that the jury would be authorized therefore to return, alternatively, one of three forms of verdict, i.e., not guilty,

or guilty of violation of Section 7203, or guilty of violation of Section 7262, depending upon the jury's findings on the evidence presented.

The two sections are entirely separate and distinct entities. Section 7262 reads:

> "Any person who does any act which makes him liable for special tax *under subchapter B of chapter 35* without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000." (Emphasis added.)

Subchapter B of Chapter 35 is entitled "Occupational Tax," 26 U.S.C. 4411. Section 7203, on which the prosecution was based, makes it an offense to wilfully fail to file wagering *excise* tax returns as required by 26 U.S.C. 4401 which is contained in *Subchapter A* of Chapter 35 and therefore has no relation whatsoever to Section 7262.

The complete answer to appellant's contention here is that he was not charged in these counts with wilful failure, in violation of Section 7203, to pay the special occupational tax. If he had been so charged then Section 7262 would indeed have been a lesser included offense.

The trial court quite properly denied what would have been an erroneous instruction.

III. *Separation of Jurors*

Next it is urged that it was reversible error for the district court to allow the jurors to separate overnight after they had begun their deliberations. No objection was made at the time but appellant says that he could not have done so in the presence of the jurors without incurring their prejudice. A general objection was made

the following morning without suggestion that there had been actual prejudice in any specific way.

A review of the record here shows no suggestion of prejudice whatsoever by this procedure, nor is there any reason advanced why an objection could not have been made in the absence of the jury. Assuming, arguendo, that a timely objection had been made there still is nothing to suggest that the trial court would have abused its discretion by overruling it. Appellant concedes that the trial court has broad discretion to allow the jurors to separate during the course of the trial and prior to the submission of the case to them for deliberation, but urges that jurors in criminal cases may not be dispersed, as a matter of the court's discretion or otherwise without the accused's consent, at any time after submission of the case to them until finally discharged. This is advanced as a proposition stemming from the Fifth Amendment and one which sweeps away all necessity for any factual showing or suggestion of actual or implied prejudice to the defendant on trial. Appellant states the court may not prejudice his right to a verdict "by placing the jurors in a position of comfort whereby their deliberations may be looked on in a different light the next day."

To fashion an inflexible rule as urged here would in our judgment be at least as likely to create potentially prejudicial situations as to cure them. There are indeed countless circumstances when jurors should be sequestered. To catalogue these many splendored variables would be endless – and totally unproductive. The more obvious ones relate to the danger of adverse publicity. In many situations it is not difficult to recognize that

defendant's right to a fair trial has been actually prejudiced where *facts* are shown. To presume without an inference of factual prejudice that a recess of the jurors, at any particular point, operates as a matter of law to the prejudice of the defendant is logically untenable. There is much to be said for the view that jurors, even as judges, are more likely to perform their duty fairly and correctly when they are not subjected to extended periods of arbitrary and pointless personal confinement. Mr. Justice Holmes commenting in 1910 on the general role of jurors said in *Holt v. United States,* 218 U.S. 245, 249, ". . . there is force in the judge's view that if juries are fit to play the part assigned to them by our law they will be abie to do what a judge has to do every time that he tries a case on the facts without them, and we cannot say that he was wrong in thinking that the men before him were competent for their task."

There is no factual showing of prejudice here, nor is any suggested by inference or otherwise. Nor can we raise the demand for sequestration of a jury after submission to the level of a Constitutional *sine qua non.* There are widely divergent practices and procedures with respect to the goings and comings of jurors within our federal system and, for that matter, among the various states, and there does not appear to be any compelling reason to freeze this aspect of jury service into rigid or ritualistic uniformity.

Some of these procedural matters have been subject of specific legislation, and others have developed through individual court rule or practice. The Seventh Circuit has set rather stringent restrictions on the separation of jurors after deliberations have begun in its opinion in *United States v. D'Antonio,* 342 F.2d 667 (1965), and

United States v. Panczko, 353 F.2d 676 (1965). Even the majority of the court in these cases, however, recognized that there are some circumstances which allow for the exercise of judicial discretion by distinguishing, and not overruling, that court's prior opinion in *Lucas v. United States,* 275 Fed. 405 (1921), where lack of suitable quarters for jurors, coupled with appropriate instruction of the court, combined to make the separation permissible. This rigid rule of sequestration of jurors follows the Massachusetts' view as expressed in *Commonwealth v. Della Porta,* 324 Mass. 193, 85 N.E. 2d 248 (1949), but whatever its historical origin it has not had wide acceptance. As noted in Judge Swygert's dissent in *D'Antonio, supra,*

> "Moreover, separation of the jury during deliberation of its verdict and separation during the course of the trial are not logically distinguishable. If jurors are apt to be influenced by outside contacts during periods when they are separated while deliberating, they are equally apt to be influenced by those contacts during the trial. The protection against such evil ordinarily is provided by an admonition from the judge and by an adherence to the admonition by conscientious jurors. When circumstances demand, confinement should be ordered. This, however, is a matter that ought to be left to the sound judgment of the trial judge."

This Court has aligned itself with the predominant view as expressed most recently in *Grant v. United States,* 368 F.2d 658 (1966), that juries may be dispersed in the discretion of the trial judge, and absent a showing of actual prejudice its exercise of that discretion will not be overturned. See also *Estes v. United*

States, 335 F.2d 609, 615 (5th Cir. 1964), cert. den. 379 U.S. 964, rehearing den. 380 U.S. 926.

Judge Bell, speaking for the Court in *Grant, supra,* noted:

> "There is likewise no merit in the contention that the court erred in allowing the jury to separate after submission of the case. There was no objection to the procedure. There is no suggestion of prejudice from the separation."

The case under consideration here virtually parallels the facts and requires the same result as *Grant, supra.* There are two differences. Here defense counsel did object but not until the morning after dispersal and, secondly, the jury had already reached, before dispersal, what was ultimately its final verdict.

The failure to make timely objection to the dispersal in the jury's presence is also answered in *Grant* where it was stated at 660:

> ". . . It is no answer to say that it would have prejudiced his case to object in the presence of the jury at the time separation was permitted. Objection could have been made out of the hearing of the jury without the problem of prejudice arising."

Even where there was a specific objection concerning newspaper and radio reports (not present here) the Eighth Circuit recently reached a similar conclusion in *Cardarella v. United States,* 375 F.2d 222, 227:

> "The jury failed to reach a verdict after two hours of deliberation on the day the case was submitted and was excused until the following morning. None of the defendants made any objection to this procedure, nor had there been a request to confine the jurors during the course of the trial. It was

> not until the Court convened the next day that any objection was voiced, that solely on the theory newspaper reports published that morning and radio broadcasts concerning the case were prejudicial to the defendants. There was neither a showing nor even an intimation that any juror actually saw the newspaper, heard any of the broadcasts, or was in any way influenced thereby."

Moreover, the Supreme Court has stated in its per curiam opinion in *Marshall v. United States,* 360 U.S. 310, "The trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial." The Court then cites *Holt, supra,* and says, "Generalizations beyond that statement are not profitable because each case must turn on its own facts."

Here the trial court gave full, explicit and correct instructions to the jurors before allowing them to disperse. Clearly there was no abuse of discretion in this instance.

IV. *Acceptance of Verdict*

Finally, appellant contends that the trial judge virtually "instructed" the jury to return a verdict it had already reached before its overnight dispersal. The record itself refutes this completely. After the jury had deliberated all morning of the second day the court questioned the foreman about the ability of the jury to reach a verdict and upon being advised that the jury might not be able to agree on each and every count of the multiple count indictment explained that a mistrial could be declared on those counts upon which the jury was unable to agree and gave them additional time to deliberate with the request that the jury report on any count upon

which agreement had been made prior to the overnight dispersal. The pertinent colloquy speaks for itself:

> "The COURT: Mr. Foreman, have you arrived at a verdict, sir?
>
> The FOREMAN: We have on Counts Five, Seven, and Eight, sir.
>
> The COURT: Counts Five, Seven, and Eight?
>
> The FOREMAN: Yes, sir.
>
> The COURT: Can you state to the court at this time whether or not you arrived at those verdicts yesterday afternoon before your dispersal?
>
> The FOREMAN: Yes, sir.
>
> The COURT: All right, sir, will you present the verdict to the Marshal?
>
> (Whereupon, the verdict of the jury was delivered to the court.)
>
> The COURT: All right, sir, will the Clerk publish the verdict."

There is patently no merit in appellant's adjunctive contention here that the trial court thereby had no authority to accept a "partial verdict." Each count of an indictment is an entity, and each verdict rendered on each count is an entity. See *Dunn v. United States,* 284 U.S. 390, 393 (1932); *United States v. Russo,* 335 F.2d 299, 301 (7th Cir. 1964), cert. den. 379 U.S. 962 (1965).

The judgment of conviction on Counts Five, Seven, and Eight are

AFFIRMED.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1966

No. 23784

D. C. Docket No. 24364—Criminal Action

JOHN OWEN TYLER,

Appellant,

VERSUS

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Georgia

Before COLEMAN and AINSWORTH, Circuit Judges, and CARSWELL, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

July 10, 1968

Issued as Mandate:

APPENDIX "B"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 23784

JOHN OWEN TYLER,
Appellant,

VERSUS

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of Georgia

(December 17, 1968)

ON PETITION FOR REHEARING

Before COLEMAN and AINSWORTH, Circuit Judges, and CARSWELL, District Judge.

PER CURIAM: The language in *Grosso v. United States,* 390 U.S. 62, 71 (1968), makes it clear that there are factual situations in which the Fifth Amendment privilege defined in *Grosso,* supra, and *Marchetti v. United States,* 390 U.S. 39 (1968), may be waived. The record here affirmatively establishes waiver by this defendant within the meaning of *Grosso,* supra.

Petition for rehearing, therefore, is hereby

DENIED.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 939

JOHN OWEN TYLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 11-22) is reported at 397 F.2d 565.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 1968, and a petition for rehearing was denied on December 17, 1968. The petition for a writ of certiorari was filed on January 13, 1969. The jurisdiction of this Court in invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's conviction on three counts of an indictment charging him with willful failure to file wagering excise tax returns as required by 26 U.S.C. 4401 must be overturned as the result of this Court's decision in *Grosso* v. *United States*, 390 U.S. 62, despite the fact that petitioner did file such returns in the months both preceding and following those months in which he was charged with failing to do so.

STATEMENT

Petitioner was charged by indictment in the Northern District of Georgia with 25 counts involving violations of the federal wagering tax laws (26 U.S.C. 4401 *et seq.*). Three counts charged failure to file wagering excise tax returns in violation of 26 U.S.C. 7203; seventeen charged the filing of false returns in an attempt to evade payment of the tax in violation of 26 U.S.C. 7201; and five charged attempted evasion of the tax by failing to file returns in violation of 26 U.S.C. 7201 (R. 1-24). On April 13, 1966, he was convicted on the counts charging violation of Section 7203 and received three concurrent one-year sentences and three cumulative $1000 fines; on the counts charging violations of Section 7201, the jury was unable to reach a verdict and a mistrial was declared.

Argument on petitioner's appeal from this conviction was heard in the court of appeals on May 17, 1967, and an opinion affirming the conviction was rendered on July 10, 1968 (Pet. App. 11-22). A peti-

tion for rehearing, raising for the first time petitioner's asserted Fifth Amendment defense under this Court's decision in *Grosso* v. *United States*, 390 U.S. 62, was filed on July 24, 1968. That petition was denied in a *per curiam* opinion on December 17, 1968 (Pet. App. 24).

The evidence (see R. 92-112), insofar as it is relevant to the issue presented in this petition, showed the following chronology of petitioner's filing and failing to file monthly wagering excise tax returns (dates in italics indicate the months involved in those counts on which petitioner was convicted):

September, 1960 — return filed
October, 1960 — return filed
November, 1960 — return filed
September, 1961 — return filed
October, 1961 — *no return filed*
November, 1961 — return filed
December, 1961 — *no return filed*
January, 1962 — *no return filed*
September, 1962 — return filed
October, 1962 — return filed
November, 1962 — return filed
December, 1962 — return filed
January, 1963 — return filed
February, 1963 — return filed
April, 1963 — no return filed
May, 1963 — no return filed
June, 1963 — no return filed
July, 1963 — no return filed
August, 1963 — no return filed
September, 1963 — return filed
October, 1963 — return filed
November, 1963 — return filed
December, 1963 — return filed
January, 1964 — return filed
February, 1964 — return filed

ARGUMENT

Petitioner's contention that, under the law existing prior to this Court's decision in *Grosso* v. *United States*, 390 U.S. 62, he may not be held to have waived his privilege against self-incrimination by complying with the requirements of the wagering tax laws, is not applicable on the facts of this case. The effect of his compliance with those laws in months both preceding and following those on which his conviction was based is sufficient to remove petitioner from the class of persons entitled to the protection of the Fifth Amendment under the rationale of *Grosso*.

As this Court said in the companion case of *Marchetti* v. *United States*, 390 U.S. 39, 61:

> If, in different circumstances, a taxpayer is not confronted by substantial hazards of self-incrimination, or if he is otherwise outside the privilege's protection, nothing we decide today would shield him from the various penalties prescribed by the wagering tax statutes.

Both the *Grosso* and *Marchetti* decisions were designed to eliminate the dilemma facing the professional gambler—that is, the choice between (1) complying with the federal tax laws and risking the discovery of his activity by State and local law enforcement agencies, or (2) refusing to comply with the federal law and risking the penalties for that failure. When one horn of that dilemma is removed, the scheme of the wagering tax laws no longer presents a problem of constitutional dimension. Here petitioner's actions both before and after the period at issue have

entirely vitiated whatever argument he might have been able to make that his failure to file wagering tax returns in October and December 1961 and January 1962 was motivated by his unwillingness to risk possible incrimination.

From September 1960 to February 1964, petitioner filed seventeen wagering tax returns—four prior to October 1961 and one immediately thereafter—and twelve in various months starting with September 1962. Moreover, petitioner was registered as a professional gambler and held a wagering occupational tax stamp for the period 1960-1964 (R. 94-96). Under such circumstances, it is clear that his filing of wagering excise tax returns for the months involved could not possibly have subjected him to any "substantial hazards of self-incrimination" to which he had not already been subjected many times over.[1]

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[1] Although the court below suggested that petitioner had effectively "waived" his Fifth Amendment privilege by filing other tax returns (Pet. App. 24), there is actually no need to consider the question of waiver here. Unlike the situation in *Grosso* and *Marchetti*, no real danger of possible incrimination for petitioner obviously existed when he elected to refuse to comply with the wagering tax laws, so there was no occasion for invoking the privilege. See *e.g.*, *Rogers* v. *United States*, 340 U.S. 367, 372-373. Moreover, the court's determination in *Grosso* that the failure there to challenge the occupational tax counts on constitutional grounds did not amount to an "effective waiver" of the privilege (390 U.S. at 71) is not helpful to petitioner. The decision thus to proceed there was obviously made as a matter of trial strategy and in light of this Court's earlier decisions in *United States* v. *Kahriger*, 345 U.S. 22, and *Lewis* v. *United States*, 348 U.S. 419, which dealt only with the occupational tax and not the excise tax. It in no respect reflected a judgment that compliance with the occupa-

Accordingly, petitioner's belated attempt to rely upon the privilege to excuse his failure to file these returns must fail.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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tional tax requirements, unlike the excise tax requirements, would have involved no significant risk of incrimination. In contrast is the situation here, where petitioner complied with both requirements, except for the several months for which he failed to file returns, and it was for this failure that he was convicted.

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